Laro Maintenance Corp. *and* Local 32B-32J, Service Employees International Union, AFL–CIO; and Amalgamated Local Union 355, Party to the Contract

Amalgamated Local Union 355 *and* Local 32B-32J, Service Employees International Union, AFL–CIO; and Laro Maintenance Corp., Party to the Contract. Cases 29–CA–15196 and 29–CB–7890

September 20, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 5, 1993, Administrative Law Judge Steven Davis issued the attached decision and erratum dated March 2, 1993. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Laro Maintenance Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

''(a) Subject to the limitation set forth in the Board's decision, offer the following employees immediate and full employment to the positions in which they would have been employed but for the discrimination against them, without prejudice to their seniority or any other rights and privileges to which they would have been entitled absent the discrimination against them, discharging, if necessary, any employees hired in their place, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision:

Aurelio Carrera	Ray Marrow
Lucy Copland	Josephine Moran
Edna Golden	Lucy Ramirez
Jose Gonzalez	Trufino Regalada
Leroy Harris	Mario Rosado
Betty Jones	Luis Quebrada
Felix Leon	

''(b) Remove from its files any reference to the unlawful refusal to hire the discriminatees named above for its Cadman Plaza operation and notify them in

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepted to the judge's finding that employee Luis Quebrada, who worked at the Respondent's Jamaica Center facility for 2 days after he was denied employment at its Cadman Plaza facility, had informed Supervisor Wally Perkins that he was quitting. Contrary to the judge's finding, the record indicates that Quebrada walked off the Jamaica job without notice or warning to the Respondent. We find that this inadvertent error does not affect the outcome of the case.

[2] We agree with the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act when it refused to hire 13 of its predecessor's employees in order to avoid an obligation to bargain with Local 32B-32J. In so finding, we note that the Respondent had no legitimate reason for refusing to interview or consider the predecessor's employees who applied for positions at Cadman Plaza requiring their particular skills and experience. Indeed, the Respondent admitted that it had predetermined that it would not hire any more of the predecessor's employees than it believed it was required to by General Services Administration (GSA), the party contracting for its services. We also find that the Respondent's hiring practices evidenced a discriminatory motive. While refusing to even consider the experienced pool of incumbent employees, the Respondent hired four new employees, three of whom had no cleaning and maintenance experience, and transferred two employees with poor disciplinary records from its Jamaica Center jobsite. Under these circumstances, we find that the Respondent's refusal to hire the 13 incumbent employees was motivated by the employees' prior employment by Prompt Maintenance Services, Inc. and their representation by Local 32B-32J, and its desire to avoid having to recognize and bargain with Local 32B-32J.

In finding that the Respondent refused to hire 13 of the predecessor's employees in order to avoid successorship, Member Raudabaugh recognizes that the Respondent did hire 10 predecessor employees, albeit at the urging of GSA. However, these 10 employees were less than half of the approximately 21 employees at Cadman Plaza. Further, the Respondent believed (erroneously) that Cadman Plaza and Jamaica constituted a single unit, and 10 predecessor employees were clearly a minority in that unit.

[3] We note that in his remedy section the judge inadvertently referred to 10 discriminatees. In fact, as the judge found in his analysis section, the Respondent unlawfully refused to hire 13 employees. We correct this error.

We agree with the judge that it is unclear which of these employees are entitled to reinstatement and backpay, and that this issue should be resolved at the compliance stage of this proceeding. In this connection, we note that the predecessor employed approximately 23 cleaning and maintenance employees at Cadman Plaza, while the Respondent has employed approximately 21 employees to perform this same work at Cadman Plaza (three of whom also worked at Jamaica). We also note that the Respondent hired 10 predecessor employees. Thus, there are approximately 11 positions for 13 discriminatees. Since the numbers are inexact, we leave to compliance the issue of how many discriminatees will be entitled to reinstatement and backpay. We shall modify the judge's recommended Order to make clear that the reinstatement and make-whole provisions are subject to this limitation.

We shall also modify the judge's recommended Order to require that the Respondent remove from its files any reference to the unlawful refusal to hire.

writing that this has been done and that the refusal to hire will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 29–CB–7890 is severed from Case 29–CA–15196 in accordance with the informal settlement agreement.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to hire applicants for our Cadman Plaza operation because they were represented by Local 32B-32J, Service Employees International Union, AFL–CIO or to avoid a bargaining obligation with that union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, subject to the limitation set forth in the Board's decision, offer the following employees immediate and full employment to the positions in which they would have been employed but for the discrimination against them, without prejudice to their seniority or any other rights and privileges to which they would have been entitled absent the discrimination against them, discharging, if necessary, any employees hired in their place, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest:

Aurelio Carrera	Ray Marrow
Lucy Copland	Josephine Moran
Edna Golden	Lucy Ramirez
Jose Gonzalez	Trufino Regalada
Leroy Harris	Mario Rosado
Betty Jones	Luis Quebrada
Felix Leon	

WE WILL remove from our files any reference to our unlawful refusal to hire the individuals named above and notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

LARO MAINTENANCE CORP.

Rosalind Rowen and *Anthony Ambrosio, Esqs.*, for the General Counsel.

Ira A. Sturm, Esq. (Manning, Raab, Dealy & Sturm, Esqs.), of New York, New York, for Local 32B-32J.

Clifford P. Chaiet, Esq. (Kaufman, Naness, Schneider & Rosensweig, P.C.), of Melville, New York, for the Respondent.

Stephen H. Kahn, Esq. (Kahn, Opton, Handler, Gottlieb & Feiler, Esqs.), of New York, New York, for Local 355.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on October 11, 1990, by Local 32B-32J, Service Employees International Union, AFL–CIO (Local 32B), a complaint was issued by Region 29 of the National Labor Relations Board on January 23, 1991, against Laro Maintenance Corp. (Respondent).

The complaint, as amended prior to and at the hearing, alleges essentially that Respondent, on taking over a cleaning contracting operation, failed to hire 13 named employees who were previously employed by the predecessor contractor. The complaint alleges that they were refused hire because of their membership in Local 32B.

Respondent's answer denied the material allegations of the complaint, and on April 28 and June 1 through 4, 1992, a hearing was held before me in Brooklyn, New York.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, having its principal office and place of business at 21 Otis Street, West Babylon, New York, has been engaged in providing maintenance, office cleaning, and related services at work sites within New York State, including a Federal Government building located at 225 Cadman Plaza, Brooklyn, New York, and at One Jamaica Center, Jamaica, New York (Jamaica).

Respondent asserted the affirmative defense that the Board lacks jurisdiction over it because ''the United States Government controls significant terms and conditions of employment of the employees at issue herein.'' This defense will be discussed, infra.

However, Respondent admitted all the jurisdictional allegations of the complaint, as follows. During the past year, Respondent purchased and received at its West Babylon facility, and at its other work sites within New York State, cleaning supplies and other products valued in excess of $50,000, directly from other enterprises located within New York State, each of which other enterprises had received those products, valued in excess of $50,000, directly from points outside New York State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits, and I also find that Local 32B, and Amalgamated Local Union 355, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Prompt Maintenance Services, Inc. (Prompt) had contracts with the United States Government, General Services Administration (GSA) to perform cleaning and general maintenance work at a Federal building at 225 Cadman Plaza, Brooklyn (Cadman Plaza). That building consists of a Federal courthouse and offices of the Internal Revenue Service (IRS). The contracts with Prompt ran for about 6 years. Following the expiration of the last contract, two extensions of the contract were entered into, the last expiring on September 30, 1990.

Prompt had a collective-bargaining agreement with Local 32B covering its employees at Cadman Plaza.

In April 1990, GSA solicited new bids for the cleaning contract. The bid solicitation package included the 1987 collective-bargaining agreement between Local 32B and Prompt covering the employees employed at Cadman Plaza. Pursuant to the bid solicitation, bidders were required to pay the ''prevailing wage,'' which, in this case, was the wages and benefits set forth in that 1987 contract. The bid solicitation did not require that the bidder hire the current cleaning employees or employ the same number of employees as the former contractor. The contract did require, however, that ''initially, not less than 50 percent of the staff shall be trained and experienced cleaning personnel.''

Respondent submitted its bid, and on May 10, 1990, it was determined to be the successful bidder, with a bid of $60,875 per month. The bid submitted by Prompt was for a sum of about $80,000 per month. On September 7, 1990, GSA formally awarded the contract to Respondent.

Robert Bertuglia, Respondent's president, testified that on September 17, he told Larry Tomscha, a GSA official, that he intended to interview the current Prompt employees, retain about five of them, and ''get rid of the dead wood.'' In addition, he expected to bring in some of his current employees from Jamaica who already had Government identification. Tomscha told Bertuglia that Local 32B had a contract with Prompt. Bertuglia replied that his union was Local 355.

Respondent's answer admitted that on about September 17, Local 32B requested that Respondent continue to employ or hire those employees of Prompt employed at Cadman Plaza.

Bertuglia requested and received a ''walk-through'' inspection of Cadman Plaza on September 18, 1990. Gertrude Joyner, the building inspector for GSA assigned to Cadman Plaza, conducted the tour. According to her, she mentioned the names of various employees as being ''good workers.'' Bertuglia did not take any notes of their names. They also saw two Prompt employees who were asleep. Bertuglia testified that he had determined not to employ any of Prompt's employees. He further stated that it was Respondent's practice to employ new workers so that they could be trained in its methods, whereas hiring the same workers would cause a perpetuation of their ''old habits.'' Emily McCollum, a Prompt employee hired by Respondent, testified that Respondent's supervisor, Wally Perkins, told her that if he had a choice, he would not have hired any former Prompt employees because anyone who has been working in a building for a long time becomes set in their ways.

Following the walk-through, Bertuglia met with Charles Evans, the Cadman Plaza building manager employed by GSA, and with his assistant, Russell Anthony. Bertuglia informed Evans that Respondent would be performing the contract with about 11 employees. When Evans remarked that Prompt had 21 employees at work in the building, Bertuglia replied that Respondent would be using more modern equipment and specialized crews which would obviate the necessity for employing many employees on a regular, day-to-day basis. Evans responded that the cleaning contract was a performance contract, and not a manpower contract, so that if the contractor was able to perform the contract with fewer employees, it could do so.

According to Bertuglia, Evans told him at that meeting that GSA had made many deductions from Prompt's monthly fee.[1] At that meeting, Evans told Bertuglia that Local 32B represented the cleaning employees employed by Prompt at Cadman Plaza. Bertuglia told him that Respondent had no agreement with Local 32B, and that it would be bringing in all new workers. He testified that he wanted to bring in new employees because of the deductions imposed on Prompt, which Bertuglia attributed to improper work by the cleaning crew, and because of his observation of two sleeping Prompt employees. Evans replied that before any changes in employees were made they should meet again because certain judges requested that the people who cleaned their areas be retained. Evans told Bertuglia that it would be ''advantageous'' for him to hire as many of the Prompt employees as possible. Evans also told him to interview all the Prompt workers.

Following that meeting, Evans directed Joyner to prepare a list of the 10 best employees employed by Prompt at Cadman Plaza. Evans did not know whether the judges' requests played a part in the selection of the 10. Joyner prepared a list, and at a meeting held on about September 21, Evans presented the list to Bertuglia, saying that he needed to retain those named. The list is entitled ''better cleaners from Prompt Maintenance.''

On September 25, Respondent's representatives distributed applications for employment to Prompt's employees at Cadman Plaza. Virtually no questions were asked orally of those employees concerning their backgrounds or experience. This application process was a gesture in futility as a decision had already been made that only the 10 employees recommended by GSA would be hired by Respondent for Cadman Plaza. Bertuglia stated that he hired the 10 former Prompt employees only because Evans asked him to, and he sought to follow his instructions because Evans would be authorizing payment to Respondent each month.

On September 28, the last day of the Prompt contract, a list of the 10 employees who would be hired by Respondent was posted. Those 10 were the same as on the list given to Bertuglia by Evans.

Certain of the employees not hired by Respondent had been employed for a number of years by Prompt and its predecessors at Cadman Plaza, and had good work records. Respondent did not contact Prompt concerning the qualifications of its employees.

Respondent had a collective-bargaining agreement with Local 355 covering its employees employed in Jamaica. The contract ran from August 1, 1990, to July 1, 1993.

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[1] Evans' testimony is unclear as to when he made such a comment. He testified that in March or April 1992, he told Bertuglia that such deductions were made only after Prompt lost the bid.

On September 28, 1990, Respondent entered into a supplemental agreement with Local 355, covering its Cadman Plaza employees and also its Jamaica employees. Respondent's president, Bertuglia, testified that he extended recognition to Local 355 for the Cadman Plaza employees at that time, notwithstanding that its contract with GSA, had not yet begun for the work at Cadman Plaza, and no employees had begun work for Respondent at that location, because a Local 355 business agent told him that Cadman Plaza was an ''extension'' of Jamaica.

The complaint in this case originally contained allegations concerning the recognition of Local 355, set forth above. However, on the opening of the hearing herein, Respondent admitted those allegations of the complaint which asserted that (a) Local 32B represented a majority of employees of Respondent and was the exclusive representative of Respondent's employees and (b) Respondent recognized Local 355 and executed a contract with it notwithstanding that Local 355 did not represent a majority of its employees and that Local 32B was the exclusive collective-bargaining representative of its Cadman Plaza employees. Accordingly, on the opening of the hearing herein, Respondent entered into an informal settlement agreement pursuant to which it agreed to cease recognizing and applying its contract with Local 355 to the Cadman Plaza employees, and pursuant to which it agreed to recognize and bargain with Local 32B for its Cadman Plaza employees.

Facts Concerning Jurisdiction over Respondent

The contract between Respondent and GSA states that ''the contractor shall provide all management, supervision, labor, material, supplies, and equipment . . . and shall plan, schedule, coordinate and assure effective performance of all services . . . .'' The contract further states in section C, paragraph 4, that:

> The Contractor shall arrange for satisfactory supervision of the contract work. The Contractor or his supervisors shall be available at all times, when the contract work is in progress . . . . It is the policy of GSA that Government direction or supervision of the Contractor's employees, directly or indirectly, shall not be exercised.

Section C, paragraph 6B, states that ''all personnel will receive close and continuing first-line supervision by the contractor.''

Section H, paragraph 3, states that ''the Contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, appearance, and integrity and shall be responsible for taking such disciplinary action with respect to his employees as may be necessary.''

Ralph Caizzo, the contracting officer for GSA, stated that the GSA staff at Cadman Plaza does not have the power to hire, discharge, discipline, or transfer a contractor's employees, and no power to make recommendations concerning those functions. However, as set forth above, GSA's official, David Evans, did make a strong recommendation to Respondent that 10 named Prompt employees be hired by it. That recommendation was followed. In addition, GSA requires fingerprint and security checks of employees employed by Respondent.

GSA did not have any involvement in the negotiation of the collective-bargaining agreement between Local 355 and Respondent, or the attempted extension of that agreement to the Cadman Plaza employees. Nor did GSA play a role in the negotiation or administration of the contract between Local 32B and Prompt. Caizzo further testified that GSA does not have a right of final approval over union contracts negotiated by its contractors.

GSA does require its contractors to meet the prevailing wage standards, which has been defined as the current collective-bargaining agreement's provisions.

Luis Quebrada

The amended complaint alleged that Luis Quebrada, an employee of Prompt, was refused hire by Respondent on about September 28, 1990. Respondent denied that allegation, and asserts that he was a supervisor of Prompt.

Quebrada worked for Prompt as an assistant superintendent at Cadman Plaza from 1989 until its contract ended in September 1990. As an assistant superintendent, he helped Superintendent John Hodges manage the building. He utilized a list of employees to call if replacements were needed. Quebrada made the calls to Spanish-speaking employees, and if Hodges was absent. Quebrada told Hodges how many replacements were needed, and Hodges told him who to call. Quebrada did not decide who on the list should be called. Quebrada stated that while employed for Prompt, an incident occurred in which employee Darlene Lane called him and said that she would be arriving late to work. She never appeared, and he reported this incident to Hodges. Quebrada testified that Hodges told him to tell Lane to see him, or told him to tell Lane that she was suspended. Quebrada testified that he did not impose discipline on employees. Rather, he reported any incidents to Hodges, and that Hodges decided on appropriate action.

Quebrada also performed physical work for Prompt. He buffed floors and cleaned carpets. He helped Hodges with the garbage, and also helped him perform periodic cleaning such as window cleaning. He stated that he performed physical work nearly the entire day. Quebrada earned $1.12 more per hour than Hodges, which he attributed to his staying at work later.

Former Prompt employee Jose Gonzalez testified that Quebrada did not grant time off to any workers, issue any warnings, or assign or reassign him to work. However, if Quebrada needed help unloading a truck, he asked Gonzalez to help. As a supervisor, Quebrada was responsible for ensuring that the work was done in the building, and he walked around the building ''checking'' people. Gonzalez saw Quebrada perform manual work such as buffing floors.

Two to three days before Respondent began its contract at Cadman Plaza, Quebrada completed an application at Respondent's request. Respondent's officials Wally Perkins and Louis Vacca[2] asked him if he knew how to buff floors and perform other cleaning. He said he did, however, he was not offered a job with Respondent.

On October 1, the first day that Respondent began work at Cadman Plaza, Quebrada asked Perkins if any jobs were available at Cadman Plaza. Perkins said no. Quebrada then

[2] Perkins and Vacca are, respectively, Respondent's project manager and supervisor. Both are admitted supervisors.

said that he had personal problems and needed a job. He was asked about his work experience, and was told to report to work at Jamaica the following day. He did so, and worked at Jamaica for 2 days. Quebrada quit after working 2 days, and joined the picket line of the former Prompt employees at Cadman Plaza. Quebrada stated that he quit the job because he was overworked, received less pay than at Prompt, and worked fewer hours. He told Perkins, but not his immediate supervisor, that he was quitting. After 1 week, Quebrada called Respondent and told Vacca that he had not yet received his pay for the 2 days he worked. Vacca said that he had ''nerve'' asking for his pay. Quebrada asked for the return of his former job at Cadman Plaza. Vacca refused, saying that he had no positions for anyone who worked for Prompt.

Gertrude Joyner, the building inspector for GSA, testified that following Quebrada's quitting, Perkins told her that someone in Respondent's office told him not to hire any other former Prompt employees because of the situation concerning Quebrada.

Jose Gonzalez

Jose Gonzalez was employed by Prompt until its contract ended in September 1990. He completed an application for, but was not hired by Respondent. On October 1, he returned to Cadman Plaza to retrieve letters of commendation regarding his work performance. Quebrada accompanied him at that time.

Joyner testified that she saw Gonzalez enter the building on that occasion, and she heard Respondent's supervisor Vacca ask Gonzalez: ''Do you want to work?'' Joyner stated that Gonzalez answered, ''no,'' saying that he just wanted his papers. In her pretrial affidavit, Joyner stated that ''Jose Gonzalez was offered a job with Laro and I heard him saying ''no'' to Vacca.''

Gonzalez denied being asked anything by Vacca on that occasion, and denied being asked if he wanted work.

Quebrada testified that he heard Vacca ask Gonzalez if he was there to apply for a job, or looking for an application for a job. Gonzalez said that he was not there for such a reason. Quebrada denied that anyone offered Gonzalez a job at that time. Vacca did not testify.

Respondent's Employees at Cadman Plaza

In addition to the 10 former employees of Prompt, Respondent employed 8 other employees in its startup at Cadman Plaza. That number includes the night crew which performed floor stripping.

In view of General Counsel's allegation that other Prompt employees were discriminatorily refused hire, it is necessary to examine who was employed in their place.

Permanent Transfers from Jamaica

Four employees were transferred from Respondent's Jamaica operation: Foi Cahlou, Vincent Luis, Yonette Mathurin, and Kenneth Triblet. Cahlou, described as a very good worker at Jamaica by Supervisor Amar (Eddie) Ramdeo, requested and was granted a transfer to Cadman Plaza. Similarly, Ramdeo stated that Triblet was a good worker who apparently requested a transfer to Cadman Plaza to earn more money.

Respondent's president, Bertuglia, testified that one of the reasons that Luis and Mathurin were transferred was that their supervisor at Jamaica was unhappy with their work. Ramdeo testified that Luis frequently did not complete his assignments and made ''frivolous'' excuses that too many people were in the bathroom, preventing him from cleaning it. He also spent much of his time speaking to his friends instead of working. Ramdeo reported these shortcomings to Respondent's officials, one of whom, Perkins, told him to give Luis a chance. Ramdeo further stated that Luis was a good worker when under constant supervision. Ramdeo recommended his transfer because he was not happy with his work, and because he believed that Luis would have more respect for Supervisor Perkins at Cadman Plaza than he had for him. Ramdeo attributed Luis' poor work habits to his lack of respect for him (Ramdeo) since Ramdeo was promoted from a cleaner's position at a time when he was a coworker of Luis.

Ramdeo further testified that he requested that Mathurin be transferred because she spent too much time speaking to her boyfriend instead of working. Ramdeo reported this to Respondent's official Perkins. In April and August 1990, Mathurin was given written warnings for excessive lateness and absenteeism. On September 10, 1991, she was terminated for poor attendance and for insubordination—''answering back'' Supervisor Perkins when he asked her to perform a task.

Bertuglia testified that subsequent to Mathurin's discharge, she called him each day for 2 weeks, pleading for reinstatement, and promising to do better. Bertuglia told her that her job at Jamaica was filled but that she could work at Cadman Plaza. She started work at Cadman Plaza when Respondent began its contract there.

Respondent's Jamaica Employees Who Allegedly Also Worked at Cadman Plaza

Bertuglia testified that on commencing operations at Cadman Plaza, Respondent's six or seven employees who worked at Jamaica, split their worktime between Jamaica and Cadman Plaza, working at both locations. Those workers included Sebatine Acosta, Mario Marqez, and Amar (Eddie) Ramdeo. Acosta, however, testified that prior to giving his affidavit to a Board agent, he was told by Respondent's supervisor, Louis Vacca, that Respondent was being sued by another union, and Respondent needed two of its employees to say that they worked at both Jamaica and at Cadman Plaza. Vacca told him that he (Acosta) and Ramdeo were those selected. Acosta testified that he was instructed by Vacca to tell the Board agent that he worked the entire month of September (later changed to October) at Cadman Plaza with Ramdeo. In fact, Acosta testified, he only worked at Cadman Plaza one night, and worked the rest of the time at Jamaica, with Ramdeo.

Indeed, Ramdeo testified that Acosta worked at Cadman Plaza for only 1 night, but Ramdeo insisted that he (Ramdeo) performed work at Cadman Plaza 3 to 4 days per week in October 1990.

New Hires

Four new hires were employed by Respondent at Cadman Plaza: Ramsey Larinsanpac, Savitri Gayah, Rudolph

Rampersad, and Michael Scarbrough.[3] They were hired after being interviewed on September 25. Bertuglia admitted that three of the four had no prior relevant experience.

Gayah's application states that she has special qualifications as a receptionist, but no job experience. However, Respondent's contract specialist, Roger Durbal, was related to Gayah, and recommended her as being a good housekeeper.

Rampersad's application listed his experience as driver, construction laborer, and helper.

Scarbrough was hired by Respondent on the recommendation of his friend, Norman Thomas, a former Prompt employee, who was hired by Respondent. Scarbrough's application states that he had experience in factory and office cleaning, but the positions he lists as having held were data entry operator and research and credit rating operator.

No evidence was offered as to the prior work experience of Larinsanpac.

The Floating Night Crew

Bertuglia testified that on the start of work at Cadman Plaza, Respondent employed a night crew consisting of three to six employees who stripped floors. They worked about 2 to 3 nights per week for the first week to 3 weeks in order to bring the building's floors to a condition where they could be buffed properly. These employees were not members of any labor organization, they did not receive the prevailing wage, but received certain sick and medical benefits from Local 355.

Analysis and Discussion

The Jurisdictional Question

Respondent asserts that the Board does not have jurisdiction over it because the ''United States Government controls significant terms and conditions of employment of the employees at issue herein.''

In *National Transportation Service*, 240 NLRB 565 (1979), the Board discussed the question of an employer's ''shared exemption'' with an exempt entity from the coverage of the Act.

The Board held that the test to be applied is ''whether the employer retained sufficient control over the employment conditions of its employees to enable it to engage in effective or meaningful bargaining with a labor organization.'' *ResCare, Inc*., 280 NLRB 670, 672 (1986).

First, it is clear that the contracting agency, GSA, is an exempt entity under Section 2(2) of the Act since the term ''employer'' does ''not include the United States or any wholly owned Government corporation.''

Here, essentially the only aspect of GSA's control over Respondent's labor relations policies that may be found is Evans' strong urging that it hire 10 named former Prompt employees. Notwithstanding Respondent's determination that it would not hire any Prompt workers, Bertuglia believed that he had no choice—he wanted to satisfy the person who was signing his company's checks—and therefore hired the 10 individuals.

Even as to the recommendation for hire of the 10 workers, however, there is some question as to whether Evans' actions represent GSA policy. As set forth above, the contract between GSA and Respondent provides that Respondent is responsible for providing the ''labor'' for the performance of the contract. Moreover, Respondent hired or transferred the remainder of its complement of employees for Cadman Plaza without any involvement of GSA, aside from providing background and fingerprint reports.

In addition, GSA has no involvement in the negotiation or approval of collective-bargaining agreements between the contractor and the labor organization representing its employees, and its only requirement is that the contractor pay the prevailing wage to its employees. The prevailing wage is the collective-bargaining agreement.

Aside from requiring background security checks of Respondent's employees, including fingerprint records, and the inspection of the cleaning work by an inspector who issues deduction letters for improper performance, it cannot be said that GSA controls any aspect of the terms and conditions of employment of Respondent's employees. *Long Stretch Youth Home*, 280 NLRB 678 (1986).

Accordingly, Respondent is subject to the jurisdiction of the Act.

The Status of Luis Quebrada as an Employee

Quebrada worked for Prompt as an assistant superintendent at Cadman Plaza. He helped Superintendent Hodges manage the building. Quebrada called in replacement employees who were Spanish speaking, and in Hodges' absence he called in the non-Spanish-speaking workers too. However, he exercised no independent judgment when making such calls. He told Hodges how many replacements were needed, and Hodges told him who to call in. He did not impose discipline on any employees, but merely reported incidents of poor work performance to Hodges.

Quebrada performed physical work for Prompt. He buffed floors and cleaned carpets. He helped Hodges with the garbage, and also helped him perform periodic cleaning such as window cleaning. He stated that he performed physical work nearly the entire day. The only evidence of Quebrada's possible supervisory authority is the fact that Quebrada earned $1.12 more per hour that Hodges. This was explained by his being employed longer hours.

Inasmuch as I find that Quebrada did not possess any supervisory authority, and exercised none, I accordingly find and conclude that he was an employee of Prompt on about September 28, 1990, and that Respondent refused to hire him for its Cadman Plaza operation.

The Refusal to Hire the 13 Former Employees of Prompt

The complaint alleges that Respondent refused to hire 13 former employees of Prompt when it commenced operations at the Cadman Plaza premises. General Counsel alleges that those employees were not hired because Respondent sought to discriminate against them because of their membership in Local 32B, and also because it sought to avoid hiring a majority of employees, which would therefor impose a bargaining obligation on it.

As discussed above, Respondent did hire 10 former Prompt employees for its Cadman Plaza operation at the insistence of GSA official Evans. The question, therefore, was

[3] The names of Gayah, Rampersad, and Scarbrough are spelled as they appear on their job applications.

its motivation in not hiring the remaining 13 former Prompt employees.

Respondent denies that it failed to hire the 13 employees because of any improper motivation.

A new owner of an enterprise is not obligated to hire any of its predecessor's employees, but may not refuse to hire the predecessor's workers solely because they were represented by a union or to avoid having to recognize a union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson's v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). As the Board stated in *U.S. Marine Corp*., 293 NLRB 669, 670 (1989):

> The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

General Counsel relies on facts involving Quebrada in support of a finding of union animus. Quebrada gave uncontradicted testimony, which I credit, that when he called Respondent and asked for his pay for work performed in Jamaica, Respondent's supervisor, Vacca, told him that he had ''nerve'' asking for his pay. When Quebrada then requested a job at Cadman Plaza, Vacca refused, saying that he had no positions for anyone who worked for Prompt.

Gertrude Joyner, the building inspector for GSA, testified that following Quebrada's quitting, Perkins told her that someone in Respondent's office told him not to hire any other former Prompt employees because of the situation concerning Quebrada.

Both statements may relate to Quebrada's joining the picket line at Cadman Plaza following his quit from the Jamaica position. Such statements may also relate, as asserted by Respondent, to its displeasure with Quebrada for quitting his Jamaica position without notice to his immediate supervisor. However, there was no testimony that Respondent was upset at Quebrada for quitting. Moreover, Quebrada stated that he told Perkins that he was quitting. In any event, these statements indicate a clear desire not to employ any former Prompt employees unless strongly urged to do so, as was done by GSA Official Evans.

General Counsel also argues that the manner in which Respondent chose employees for hire provides a showing of animus, and establishes the motivation which caused Respondent to refuse to hire the remainder of Prompt's former employees. *Houston Distribution Service*, 227 NLRB 960 (1977). The Board has held that a prima facie case of discriminatory motivation may be supported by consideration of the lack of any legitimate basis for a respondent's actions. *Weco Cleaning Specialists*, 308 NLRB 310 at fn. 4 (1992).

Respondent was not required to employ any of the former Prompt employees, or hire a sufficient number of such employees so that its work force would be comprised of a majority of its predecessor's employees, as long as it did not act unlawfully.

> [Respondent] was only required to consider and select [the former Prompt employees] on the same lawful basis utilized with respect to others it considered and either selected or rejected. [*Daka, Inc*., 286 NLRB 548, 559 (1987).]

In other words, were ''all applicants for employment . . . judged by the same standard, with the failure to hire the alleged discriminatees reflecting no more than equal application of this standard?'' *Houston Distribution*, supra at 966.

General Counsel's Prima Facie Case

In my opinion, it is clear that Respondent was motivated in its hiring decisions by a desire to avoid Local 32B.

Respondent had a collective-bargaining agreement with Local 355 at its Jamaica location. Bertuglia testified that he intended to, and in fact did apply the Local 355 contract to the Cadman Plaza location regardless of the number of incumbent employees represented by Local 32B it hired. In fact, it precipitously entered into a supplemental agreement with Local 355, extending that contract to Cadman Plaza, effective September 28, 1990, when it knew that a majority of its work force was comprised of former Prompt employees who were represented by Local 32B.

Respondent's amended answer admitted that it recognized Local 355 and executed a collective-bargaining agreement with that union at a time when it did not represent an uncoerced majority of the employees employed at Cadman Plaza. In fact, Respondent had an obligation to bargain with Local 32B upon its hire of a majority of Prompt's employees. Therefore, its accretion defense, which it utilized to support its failure to recognize Local 32B, had no validity. Nor was the accretion argument asserted in good faith, as I credit the testimony of Acosta that he was coached by Respondent's supervisor to give testimony that did not accord with the truth concerning his employment at both locations.

I believe that the facts support a finding that Respondent did not intend to hire any of the former Prompt employees because of their affiliation with Local 32B. Its past practice involving the hire of employees being represented by other labor organizations supports this finding. There was evidence that Respondent succeeded to two cleaning contractor operations. The first one, involving the Jamaica contract, involved a nonunion operation, as to which Respondent hired one-third of the incumbent employees. The other was Dowling College where another union, Local 424, represented the employees. Respondent also did not want to hire any of the incumbent employees at Dowling. When Dowling insisted that Respondent hire all of the incumbents, it did so.

Similarly, here Respondent hired 10 former Prompt employees only when GSA Official Evans strongly recommended that it do so. Accordingly, where a nonunion operation was involved, such as at Jamaica, Respondent voluntarily hired one-third of the incumbent employees. Where an outside labor organization was involved, such as at Dowling, it sought to avoid hiring any of them. The fact that it hired one-third of the incumbent employees at Jamaica undercuts its position that it likes to ''start fresh'' with a new complement of employees. It therefore becomes plain that it will

''start fresh'' only where a labor organization represents the employees of the contractor it is succeeding.

In this connection, I do not credit Bertuglia's testimony that he told GSA representative Tomscha on September 17 that he intended to hire five Prompt employees and get rid of the ''dead wood.'' This would be inconsistent with its prior policy of not hiring any of the incumbent employees in order to ''start fresh.'' In addition, Respondent did not know at that time how many, if any, of the Prompt employees were ''dead wood.''

Respondent's argument that it hired the ''better'' incumbent employees at its Jamaica operation on taking over that contract does not help its position, particularly where, as here, GSA inspector Gertrude Joyner pointed out good workers on her walk-through. Although Respondent's official Bertuglia disputes that testimony, nevertheless Respondent did not seek any information from Prompt as to who the ''better'' workers among Prompt's employees, other than the 10, were. Nor did it ask them to demonstrate their cleaning skills, as it usually does, or conduct any meaningful interviews with any of them.

There is some question as to when Bertuglia was told that GSA had taken deductions from Prompt's contract due to poor cleaning. Bertuglia testified that he was told this at the meeting on September 18. Evans was vague as to when he imparted this information to Bertuglia. Even assuming that Bertuglia was told of the deductions at the September 18 meeting, and as a result of being told that, along with his observation of two sleeping employees, he then decided not to hire any Prompt employees because of those facts, it must have appeared strange to him that Evans was recommending 10 Prompt employees. Although these were labeled ''better'' employees, this was not to imply that those were the only good workers employed at Cadman Plaza. It would have been unreasonable for Bertuglia to have blamed all the Prompt employees for the deductions, especially since he was not told specifically why the deductions were made or who was responsible. Similarly, he did not know the identity of the sleeping employees or ask for an explanation as to why they were sleeping or inquire whether they were on a break.

I find that Bertuglia did not place much emphasis on whether the employees hired for Cadman Plaza were good or not since he hired people with no experience, and transferred two with poor disciplinary records, including one who had been discharged only 3 weeks before.

In contrast, Respondent had a pool of experienced employees in the incumbent Prompt workers. It thus cannot be said that Respondent considered and selected its employees ''on the same lawful basis utilized with respect to others it considered and either selected or rejected,'' particularly with respect to Luis, Mathurin and the inexperienced new hires. *Daka, Inc*., supra.

In this regard, it is important to note that employee Quebrada, formerly employed by Prompt at Cadman Plaza, was apparently considered qualified enough to be hired by Respondent for a position at Jamaica and was hired on October 1 for a position at Jamaica. However, when he inquired on October 1 about a position at Cadman Plaza, he was told that there were no positions available at that location. This, at a time when Respondent hired new employees with no experience for Cadman Plaza. It is clear that Respondent did not want to hire any more of Prompt's incumbent employees than it believed it was required to by GSA, in an effort to avoid a bargaining obligation with Local 32B.

''Despite the presence of a pool of experienced workers, respondent went to considerable length to replace the union employees with entirely new workers-most of whom had no previous experience . . . .'' *NLRB v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974).

I therefore find that the evidence establishes that Respondent embarked upon a plan to avoid hiring any former Prompt employees so that it could continue to recognize and deal with Local 355, and avoid recognizing Local 32B. If it had not been forced to hire 10 Prompt employees by GSA it is clear that it would not have hired any of them.

When viewed against the criteria required to be observed in making hiring decisions—to consider and select the former Prompt employees on the same lawful basis utilized with respect to others it considered and either selected or rejected—I must find that Respondent did not satisfy that standard. Thus, it did not consider the 13 remaining incumbent, experienced Prompt employees. Although it gave them all applications, it conducted no interviews of substance, did not inquire of GSA or the prior contractor as to their work performance, and in fact had predetermined not to hire any of them. In contrast, Respondent hired new employees with no experience, transferred one employee from its Jamaica location who was recommended for transfer for disciplinary reasons, and rehired an employee who was discharged only 3 weeks before for poor work.

Accordingly, I find that the General Counsel has made a prima facie showing sufficient to support the inference that a motivating factor for Respondent's failure to hire the 13 former Prompt employees was its determination not to become obligated to bargain with Local 32B, and because of their membership in Local 32B. *Wright Line*, 251 NLRB 1083 (1980).

I also find that Respondent has not carried its burden of proving that any of the 13 employees would not have been hired in the absence of their activities in behalf of, or membership in, Local 32B.

Bertuglia's stated reasons for not wanting to hire any former Prompt employees were as follows:

> Bertuglia wished to start the new contract with new, different and ''hopefully'' better employees. He stated that he was aware that Prompt had suffered deductions from its contract due to improper cleaning. In addition, he observed 2 employees of Prompt asleep during his walk-through of the premises in mid-September, 1990.

However, one of the ''better'' employees was Yonette Mathurin, Respondent's employee who had received warnings in April and August 1990, and was fired for excessive absenteeism and insubordination in mid-September 1990 from her position in Jamaica. Mathurin was then rehired to work at Cadman Plaza. Another was Vincent Luis, who was transferred from Jamaica for disciplinary reasons.

Bertuglia also stated that he hoped the four newly hired employees would be better than Prompt's employees, although three of them had no relevant work experience. However, he did not seek any information concerning the work performance of the Prompt employees.

When the transfer of disciplinary problem Luis, and the rehire of discharged employee Mathurin, and the three newly hired employees with no experience is considered in relation to the pool of experienced workers then employed at Cadman Plaza, who Respondent refused to consider, it becomes obvious that Respondent had other than valid business reasons for refusing to hire the remaining incumbent employees.

Its contentions that it did not wish to hire any of the incumbents because of the deductions taken from Prompt's contract and because two workers had been asleep during his walk through, should not have caused Bertuglia to paint with a broad brush all of the incumbent employees. He sought no information as to the identity of those who were asleep, nor did he seek information as to the nature of the deductions or who was responsible.

I accordingly conclude that Respondent has not shown that any of the 13 former Prompt employees would not have been hired even in the absence of their activities in behalf of, or membership in, Local 32B.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 32B and Amalgamated Local Union 355 are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to hire the following employees for its Cadman Plaza operation on September 28, 1990, because they were represented by Local 32B, and in order to avoid an obligation to bargain with Local 32B, the Respondent has violated Section 8(a)(3) and (1) of the Act: Aurelio Carrera, Lucy Copland, Edna Golden, Jose Gonzalez, Leroy Harris, Betty Jones, Felix Leon, Ray Marrow, Josephine Moran, Lucy Ramirez, Trufino Regalada, Mario Rosado, and Luis Quebrada.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the Act.

I shall recommend that Respondent offer to the 13 employees formerly employed by Prompt Maintenance at the Cadman Plaza location to whom it did not offer employment, listed below, immediate and full reinstatement, without prejudice to their seniority and other rights previously enjoyed, discharging if necessary any employees hired in their place. In this connection, I find that Jose Gonzalez is also entitled to an offer of reinstatement. Although Joyner's affidavit stated that Gonzalez was offered reinstatement on October 1, 1990, such evidence was contradicted by the testimony of Joyner, Gonzalez, and Quebrada. It is clear that following September 28, no Prompt employees were offered hire at Cadman Plaza. In fact, Quebrada, who requested hire by Respondent on the same day as Gonzalez, was refused hire for Cadman Plaza, and was instead hired for Jamaica. I accordingly cannot find that Gonzalez was offered reinstatement for Cadman Plaza on October 1.

I shall also recommend that Respondent make whole the above-named employees for any loss of earnings and benefits they may have suffered by reason of Respondent's unlawful refusal to employ them. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I note in connection with the above recommended reinstatement and backpay order, that the record discloses that Respondent operated its Cadman Plaza operation with fewer than the 21 employees employed by Prompt. Accordingly, since the record is incomplete as to the number of employees employed by Respondent at Cadman Plaza, and since the question of who among the 10 former Prompt employees should be reinstated to the available positions at Cadman Plaza remains open, I shall leave to the compliance stage of this case, the resolution of those issues.

On the foregoing findings of fact, conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Laro Maintenance Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees for its Cadman Plaza operation because they were represented by Local 32B, Service Employees International Union, AFL–CIO, or in order to avoid a bargaining obligation with that union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the manner described in the remedy section of this decision, offer to the following employees formerly employed by Prompt Maintenance Company immediate and full reinstatement, without prejudice to their seniority and other rights previously enjoyed, discharging if necessary any employees hired in their place:

Aurelio Carrera	Lucy Copland
Ray Marrow	Edna Golden
Josephine Moran	Jose Gonzalez
Lucy Ramirez	Leroy Harris
Trufino Regalada	Betty Jones
Mario Rosado	Felix Leon
Luis Quebrada	

(b) Make whole the above-named employees for any loss of earnings and benefits they may have suffered by reason of Respondent's discrimination against them, as described in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at is West Babylon, New York location, and at its Cadman Plaza facility copies of the attached notice

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.46 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''